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No. 1266

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

WALTER DLUTZ, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR REHEARING

WALTER DLUTZ, PRO-SE
7722 Old York Road
Elkins Park, Pa. 19117

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PETITION FOR REHEARING

This petition is being filed in the Supreme Court in view of its decision of June 2, 1969 dening certiorari and dening the petitioners motion to dispense with printing.

In its order there was no opinion as to why the petition for certiorari and motion to dispense with printing were denied. It would only seem proper to this petitioner for the court to have stated its reasons for denial. In the event the petition and motion were improperly presented the conditions would have been corrected in order that certiorari may have been

granted. The court should also take into consideration that this appeal is being made Pro-se, and as such is found more difficult to express and make meaningful the factors with which this petitioner relies upon for certiorari.

The points certiorari is being asked for and an explanation are as follows:

1. The F.T.C. uses strongly in its case the fact that this petitioner was the sole owner of the corporation involved in its order. This was never denied and should have no bearing on whether or not this petitioner should be included in his individual capacity in an F.T.C. order and of violation of sec. 5 of the F.T.C. Act as charged.

2. The F.T.C. states that this petitioner controlled the acts and practices of the corporation when in fact all of the evidence the F.T.C. produced was completely to the contrary.

   a. The F.T.C. tried in its thrust against the petitioner to prove that the corporation's advertising was controlled by the petitioner. Of all the witnesses called by the F.T.C. not one stated that they had received any instructions from this petitioner as to advertising policy and content. In testimony, the corporation's manager stated that "he and he alone was responsible for the corporation's advertisements and content and placement thereof".

Indeed, to overlook this fact which is so important to the vindication of this petitioner in an F.T.C. order would appear to be very bad judgement.

b. It was shown in this petitioner's initial appeal to the 3rd Circuit that this petitioner neither trained nor instructed the corporation's manager in the handling of the corporation's business but relied completely on his ability because of his past experience in the automotive field and through an employment contract which was evidenced and gave the corporation's manager broad powers for the conduct of the corporation's business.

c. The corporation mentioned in the F.T.C. complaint was in Washington, D.C. which is 150 miles from the residence and principal place of business of this petitioner in Philadelphia, Pa. and this petitioner only operated the corporation's business for a period of 2 weeks during the entire existance of the corporation which was approximately 1½ years from its beginning up to the time of the F.T.C. complaint. During this 2 week period that this petitioner operated the corporation's business, while the corporation's manager was on vacation, there were no complaints of any kind whatsoever lodged against this petitioner from any source, nor could the F.T.C. show any. On what basis then can the F.T.C. state that this petitioner was in violation of sec. 5 of the F.T.C. Act?

3. Of some 15 customer witnesses called upon to testify by the F.T.C. only one had ever had any dealings with this petitioner and those dealings were only of a second hand nature in trying to resolve a complaint. The F.T.C. knows full well that this petitioner did not in any way mislead or deceive this customer in any way but through the customer's own recorded testimony this petitioner was the person who resolved his complaint and the misrepresentations the F.T.C. has made of this customer's testimony in order to implicate this petitioner in an F.T.C. order are of a fraudulent nature themselves. The reason the F.T.C. uses this customer's testimony so viciously against this petitioner is that the F.T.C. in all of its investigation and searching has found no other witness or fact to bear out its charge that Walter Dlutz did, as an individual, violate sec. 5 of the F.T.C. Act. I can not stress this point clearly enough and must reiterate and remind the F.T.C. and the court that only one customer witness called by the F.T.C. had ever spoken to or had any dealings with this petitioner and in the course of the corporation's activities up to the time of the F.T.C. complaint there were one thousand three hundred (1,300) customers handled by the corporation in an 18 month period.
Can one dissatisfied customer out of 1300 (even if handled entirely by this petitioner, which is not the case) be grounds for a cease and desist order by the F.T.C. against an individual? This petitioner believes the F.T.C. has made

a grave mistake and erred badly without prudence or proper discretion in this area and would like the court to examine the F.T.C.'s reasons for doing so.

4. This petitioner was not tried individually by the F.T.C. for violation of sec. 5 of the F.T.C. Act although he is accused of committing such violations as an individual. The F.T.C. in its complaint mentions deceptive acts and practices as being performed by the corporation, the corporation's manager and the corporation's owner all in one inditement and all three parties were tried under the same complaint and by using the same witnesses, testimony and evidence equally against all three parties. This in itself seems a violation of individual rights and were it not so the 3rd Circuit Court of Appeals would have found that the individual Dlutz did not commit a violation of the F.T.C. Act. This petitioner asks the Supreme Court to look at the evidence produced by the F.T.C. and used against this petitioner as an individual and determine if it merits the implication of this petitioner as an individual in its order. The point being that all three parties were tried with the same evidence when all of the condeming evidence had absolutely nothing to do with this individual petitioner. In its over zealousness to implicate this petitioner in its order the F.T.C. mentions time and again irrelevant facts such as the petitioner is involved in other businesses elsewhere and to relieve this petitioner from their order would iviscerate it and insure

its effectiveness. I ask what does being involved in other businesses have to do with the charge of violating sec. 5 of the F.T.C. Act in Washington, D.C.?

5. If the Supreme Court will allow, this petitioner will show the court that the F.T.C. is basing their entire case against this petitioner using nothing but assumptions. There are no facts or evidence the F.T.C. did or can produce which would show that this petitioner did violate sec. 5 of the F.T.C. Act individually and to find him in violation thereof would constitute an injustice of individual rights.

In summary, this petitioner states in this petition for rehearing that he was only in control of the corporation's financial matters which was testified to by this petitioner and that there is no reliable probative and substantial evidence in the entire record of this case which would support the issuance of an order against this petitioner in his individual capacity for violation of sec. 5 of the F.T.C. Act as an individual.

Respectfully submitted,

Walter Dlutz

Walter Dlutz, Pro-Se
7722 Old York Road
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BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–2)[1] is reported at 406 F. 2d 227. Neither the initial decision of the hearing examiner (R. 9, Initial Decision) nor the final order and opinion of the Federal Trade Commission (R. 9, Final Order-Opinion) is officially reported.

JURISDICTION

The judgment of the court of appeals (R. 14) was entered on February 18, 1969. The petition for a

[1] "Pet. App." refers to the slip opinion of the court of appeals, affixed to the petition for certiorari.

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writ of certiorari was filed on April 15, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Trade Commission properly included petitioner, as an individual, among those it ordered to cease and desist the deceptive practices of a corporation of which he was president, treasurer, one of three directors, and sole stockholder?

STATUTE INVOLVED

Section 5(a)(1) of the Federal Trade Commission Act, 38 Stat. 719, as amended by 52 Stat. 111 and 66 Stat. 632 (15 U.S.C. 45(a)(1)), provides:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

STATEMENT

Petitioner seeks review of a cease-and-desist order entered against him, another individual, and a District of Columbia corporation, by the Federal Trade Commission (R. 9, Final Order) and affirmed *per curiam* by the court of appeals (Pet. App. 1–2). Petitioner does not challenge the Commission's finding that the corporation and the other individual engaged in deceptive practices; he contends only that the order should not have been directed against him individually.

The order directs (R. 9, Final Order, pp. 1–2):

> that respondents, General Transmissions Corporation of Washington, a corporation, and its

> officers, and Walter Dlutz, individually and as an officer of said corporation, and William J. Green, Jr., individually and as an agent of said corporation, and their agents, representatives and employees, directly, or through any corporate or other device, * * *

cease and desist from specified misrepresentations and other deceptive practices in connection with the sale, advertising and repair of automobile transmissions, motors or other products or services in interstate commerce (R. 9, Final Order, pp. 1–6). The named corporation is engaged in the business of repairing, overhauling, rebuilding and selling automotive transmissions (R. 9, Final Order-Opinion, p. 3). Petitioner is president, treasurer, one of the three directors and sole stockholder (R. 9, Final Order-Opinion, p. 3; R. 9, Initial Decision, p. 19).[2] Petitioner has interests in nine other transmission repair businesses in several states (R. 11, p. 1a, Testimony of Walter Dlutz). William Green, the other individual named in the order, was at all relevant times the corporation's general manager (R. 9, Final Order-Opinion, p. 3).

The Commission found that petitioner, Green, and the corporation had made a variety of false and misleading statements, through advertising and oral representations, concerning the price and quality of their services and the conditions upon which those services would be performed (*ibid.*). The whole method of operation was found to be unfair and deceptive: the

[2] Petitioner's wife is the only other officer of the corporation and is also a director (R. 9, Final Order-Opinion, p. 3).

evidence showed a common pattern in which a customer was induced to authorize the repair of his automobile by representations as to the low cost of repairs; was informed later of the need for much more extensive repairs than those originally anticipated; and was told that to reassemble and reinstall the transmission without repair would require an additional charge over the advertised price or would be impossible without the supposedly necessary additional parts and labor (*ibid.*). The Commission found "several cases of willful fraud, embodied in the deliberate nonperformance of services for which payment was received" (R. 9, Final Order-Opinion, p. 7), and that the testimony of all the customer-witnesses established a clear pattern and method of doing business permeated with deception (*ibid.*).

The Commission determined that petitioner formulated, directed and controlled the policies, acts and practices of the corporation (R. 9, Final Order-Opinion, p. 17). The record shows that he hired the manager, ordered the equipment and merchandise, and signed the lease for the corporation. (R. 9, Final Order-Opinion, p. 16.) All records were kept in petitioner's office in Philadelphia, to which they were transmitted daily from Washington; all bookkeeping was done there and most bills were paid from the office (*ibid.*). While petitioner did not regularly work in the Washington shop, he had himself worked on one witness' car and made representations to him "fitting perfectly the pattern of deception" established by the other evidence (*ibid*). The Commission

ruled that petitioner's control of the corporation's policies and practices, and his responsibility for the violations, required his inclusion in the order, and that failure to include him "would eviscerate it and insure its ineffectiveness" (R. 9, Final Order-Opinion, p. 19).

ARGUMENT

Petitioner urges this Court to "review the evidence in this case that purportedly implicates Walter Dlutz as an individual performing a violation of Section 5 of the Federal Trade Commission Act" (Pet. 3). The court of appeals has already reviewed the evidence, however, and held that it supports the Commission's findings (Pet. App. 2) and there is no occasion for further review.

Petitioner's suggestion (Pet. 3), that the order runs against him only because he is the "sole stockholder" of the corporation, misreads the basis of the Commission's decision. The Commission carefully reviewed the indicia of actual control and of Dlutz's knowledge of, and participation in, the corporation's fraudulent conduct (see pp. 3–5, *supra*), and based its decision expressly thereon. (R. 9, Final Order-Opinion, pp. 16–19.) Application of the order to petitioner as an individual was fully justified in the circumstances. *Federal Trade Commission* v. *Standard Education Society,* 302 U.S. 112; *Pati-Port, Inc.* v. *Federal Trade Commission,* 313 F. 2d 103 (C.A. 4). Indeed, petitioner's similar interest in other transmission repair shops located throughout the country (R. 11, p. 1a, Testimony of Walter Dlutz) would afford

opportunities for perpetration of the precise deceptive and fraudulent practices found to exist in the Washington shop, if the order did not run against him personally. The order is thus a proper exercise of administrative discretion to remedy the evil found to exist and to prevent repetitions. See *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 431; *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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